



## Family Courts

### Requirements Under the Indian Child Welfare Act and Senate Bill 678\*

#### I. Determining Application and Definitions

- A. ICWA applies to any proceeding, including Family Code proceedings, that may result in the adoption of an Indian child, the termination of parental rights of the parents of an Indian child, or the granting of care and custody of an Indian child to someone other than the child's parents or Indian custodian where the parents or Indian custodian cannot have the child returned on demand. This definition includes proceedings under the Family Code resulting in an adoption (i.e., agency, independent, intercountry, relative, guardian, domestic partner, and stepparent), termination of parental rights, freedom from parental custody and control, or other child custody proceeding under the Family Code, (i.e., Fam. Code, §§ 3041, 7541, 7600 et seq., 7660 et seq., 7800 et seq., 8500 et seq., 8600, 8700 et seq., 8800 et seq., and 9000 et seq.) that involve an Indian child. (25 U.S.C. § 1903(1); Fam. Code, § 170(c); Cal. Rules of Court, rule 5.480.)
- B. An "Indian child" is under the age of 18 and unmarried and is either (a) a member of an Indian tribe or (b) eligible for membership and the biological child of a member.
- C. An "Indian custodian" is an Indian person who has custody of an Indian child under tribal or state law or to whom temporary physical custody and control of such child has been given by the child's parent.

#### II. Investigation/Inquiry

- A. *Initial inquiry:* Before filing a petition, application, or other request of the court that could result in adoption; a declaration freeing a child from the care, custody, and control of one or both parents; or the termination of parental rights, the party seeking the order must ask the child (if the child is old enough), the parents, the Indian custodian or guardian, and available family members or others who would reasonably know, whether the child is or may be an Indian child. The party must then complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition. Wherever possible, prior to the first appearance, each of the child's parents, Indian custodian, or guardian should complete the *Parental Notification of Indian Status* (form ICWA-020), and those forms should be filed with the court. (Welf. & Inst. Code, § 224.3(a); Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a).) If the parents are not available before the first appearance, the court will order them to fill out the ICWA-020 forms at the first appearance. If the parents do not appear, the Court will order the party filing the petition, application, or other request to use reasonable diligence to find the parents and have them complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3))
- B. *Affirmative and continuing duty to inquire:* The court, court-connected investigator, party seeking the order (i.e., petitioner), adoption service provider, and licensed adoption agency all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. This means that inquiry is not a one-time occurrence. If the child's parents are not present or available at the first appearance and ICWA-020 forms are not completed and filed, the court **must** order the party to use reasonable diligence to find the parents and complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3).)
- C. *Concealing or falsifying facts concerning Indian status/sanctions:* Any party who falsifies or conceals a material fact concerning whether the child is an Indian child or counsels a party to do so is subject to sanctions by the court. (Welf. & Inst. Code, § 224.2(e); Fam. Code, § 180(f).)
- D. *Further inquiry:* If, as a result of this inquiry or from any other source, any of the persons with a duty to inquire has "reason to know" that the child is an Indian child, they must make further inquiry to learn about the child's Indian heritage. In particular they must (1) ask family members, (2) contact the Bureau of Indian Affairs (BIA), and (3) contact the tribe and anyone else who might reasonably have information about the child's heritage. (Welf. & Inst. Code, § 224.3(c); Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a)(4).)

\*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), California Welfare & Institutions Code, California Family Code, and California Rules of Court.

E. You have “reason to know” the child is an Indian child if:

1. The child, an Indian tribe, an Indian organization, an attorney, a public or private agency, or a member of the child’s extended family says or provides information to anyone involved in the case **suggesting** that the child is an Indian child;
2. The child or the child’s family or Indian custodian live in a predominantly Indian community; or
3. The child or the child’s family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. (Welf. & Inst. Code, § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5).)

F. *Document inquiry on petitions*: Item 7 on form ADOPT-200 requires you to indicate whether the child may have Indian ancestry and to attach the *Adoption of Indian Child* (form ADOPT-220) if you answer yes. (Note: Completion of the ADOPT-220 form is **in addition to** completion of the ICWA-010(A) and ICWA-020 forms.)

### III. Consent Requirements for Voluntary Proceedings (25 U.S.C. § 1913; Fam. Code, § 8606.5)

ICWA sets out special requirements when a parent or Indian custodian voluntarily gives up rights regarding an Indian child. A valid consent must meet the following criteria:

- Not be given within 10 days after the birth of the child;
- Be in writing, be recorded before a judge of the court, and be accompanied by the judge’s certificate that the terms and consequences of the consent have been fully explained in detail and have been fully understood by the parent or Indian custodian;
- If the parent or Indian custodian does not understand English, the court must certify that the explanation has been interpreted into a language that the parent or Indian custodian understands;
- If the consent is custody under Family Code section 3041, it must provide that the parent or Indian custodian may withdraw consent at any time and upon such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply;
- If the consent relates to the termination of parental rights or adoptive placement, the consent of the parent may be withdrawn for any reason at any time before the entry of the final decree of termination or adoption as the case may be, and the child shall be returned to the parent. (25 U.S.C. § 1913(c).)

### IV. Right to Counsel (25 U.S.C. § 1912(b); Fam. Code, §§ 7860, 7862)

Indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary proceeding.

### V. ICWA Notice Requirements

- A. If there is “reason to know” (See Section II (E) above) that the child is an Indian child, notice in form ICWA-030 must be sent to the child’s parents or guardians, the Indian custodian (if any), the tribe, the Sacramento office of the BIA (if applicable), and the Secretary of the Interior (if applicable) as early as possible. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2; Fam. Code, § 180; California Rules of Court, rule 5.481(b).)
- B. *What to send*: Send mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and copies of the petition.
- C. *Where/who to notice*: Notice must be sent to the child’s parents, including the adoptive parents, the guardian, the Indian custodian (if any), and the child’s potential tribe(s). If you do not know which tribe(s) the child may be affiliated with, you also must send notice to the Sacramento area director of the BIA. If you do know the child’s tribe, you must send a copy of the notice to the Secretary of the Interior. (See F. below).
- D. *How to send notice*: Notice must be sent by registered or certified mail, return receipt requested, or personal service. If a tribe intervenes in the case, you may thereafter send notice to that tribe in the same manner as to other parties.
- E. *Where to send tribal notice*: When sending notices to the child’s tribe(s), the notices must be addressed to the tribal chair or the tribe’s designated agent for service of ICWA notice. The list of designated agents for service of ICWA notice may be found at <http://edocket.access.gpo.gov/2009/pdf/E9-9644.pdf> The State Department of Social Services list of tribes may be found at: <http://www.childsworld.ca.gov/PG1322.htm>. Send notice to all tribes of which the child may be a member or eligible for membership until the court makes a determination about which tribe is the child’s tribe, after which notice need be sent only to that tribe. (Welf. & Inst. Code, §§ 224.2, 224.3; California Rules of Court, rule 5.481(b).)
- F. If you know the child’s tribe (i.e., the child is an enrolled member), you do not need to send notice to the regional BIA office, but you must send a copy of the notice to the Secretary of the Interior.
- G. *Purpose of notice*: The purpose of notice is to let the tribe(s) know of the child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings.

Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2; California Rules of Court, rule 5.481(b).)

- H. *How to prove notice:* File **with the court** copies of all notices, the certified mail receipts, all return receipts (green postcards), and all responses from a tribe or the BIA. (Note: It is not sufficient for you to state or testify that notice was sent. The notices themselves and proof of notice must be filed with the court. (Fam. Code, § 180 (d); Welf. & Inst. Code, § 224.2(c); Cal. Rules of Court, rule 5.482(b).)

**VI. Intervention/Tribal Participation (25 U.S.C. § 1911(c); Fam. Code, § 177(a); Welf. & Inst. Code, § 224.4; Cal. Rules of Court, rules 5.482(e), 5.534(i))**

- A. The child's parents, Indian custodian, and tribe may intervene at any point in the proceedings.
- B. The tribe may be represented by an attorney or may designate a nonattorney to act as tribal representative for the state court proceedings. In any case, the tribe is entitled to all the rights of a party.
- C. If the tribe does not formally intervene as a party, it may still seek permission to exercise those rights listed in California Rules of Court, rule 5.524(i)(2). **(Note: If the child is an Indian child, ICWA applies whether or not a tribe takes any formal steps in the proceedings.)**

**VII. Timing/Continuance (25 U.S.C. § 1912(a); Fam. Code, § 180(e); Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rule 5.482(a))**

- A. No hearing can be held until at least 10 days after receipt of notice by the child's parents, Indian custodian, and tribe(s).
- B. On request, the parents, Indian custodian, and tribe are entitled to up to 20 additional days to prepare for a hearing.

**VIII. Active Efforts (25 U.S.C. § 1912(d); Fam. Code, § 177(a); Welf. & Inst. Code, § 361.7; Cal. Rules of Court, rule 5.484(c).)**

- A. In any involuntary proceeding involving an Indian child, the party seeking the order must provide evidence that active efforts have been made to provide remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.
- B. Active efforts must be made in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe and must use the available resources of the extended family, the tribe, and other Indian services.
- C. Active efforts must include steps necessary to secure tribal membership for a child if the child is eligible for membership in a tribe. (Cal. Rules of Court, rule 5.484(c))

**IX. Evidentiary Requirements**

- A. Before an order for the involuntary "foster-care placement"<sup>1</sup> of an Indian child (i.e., an order under Fam. Code, § 3041) there must be clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW), that taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e); Welf. & Inst. Code, §§ 361, 361.31, 361.7(c); Fam. Code, § 177(a); Cal. Rules of Court, rule 5.484(a).)
- B. Before an order involuntarily terminating parental rights to an Indian child, there must be evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (Welf. & Inst. Code, § 361.7; Fam. Code, § 7892.5; Cal. Rules of Court, rule 5.485.)
- C. *Who can serve as a QEW?* A person knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices can serve as a QEW. Likely persons include a member of the child's tribe, an expert with substantial experience in the delivery of services to Indians (i.e., social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder) or another professional. (25 U.S.C. § 1912(e); Welf. & Inst. Code, § 224.6; Fam. Code, § 177(a); Cal. Rules of Court, rule 5.484(a).)

**X. Placement Preferences (25 U.S.C. § 1915; Fam. Code, § 177(a); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rule 5.484(b))**

- A. *Foster-care placement preferences:* ICWA establishes a hierarchy of preferences for involuntary foster-care placement. Placements must be in the least restrictive setting that most approximates a family, in which the child's special needs, if any, may be met and which is in reasonable proximity to his or her home. In any foster-care placement, preference shall be given, in descending order, to (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing

<sup>1</sup> ICWA defines such placement as any action removing an Indian child from a parent or Indian custodian for placement with another, where the parent or Indian custodian cannot have the child returned on demand but where parental rights have not been terminated. (25 U.S.C. § 1903(1)(i).)

authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

- B. *Adoptive placement preferences:* In any adoptive placement, preference shall be given, in absence of good cause to the contrary, to placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, (3) other Indian families, or (4) if no such placement is available, with a family committed to maintaining the child's connections with his or her tribe. (Note: Even in a case involving the voluntary relinquishment of an Indian child, the adoptive placement preferences should be followed.)
- C. *Tribe may alter order of placement:* The child's tribe may by resolution adopt another order of preference. (25 U.S.C. § 1915(c); Cal. Rules of Court, rule 5.484(b)(4).)
- D. *Must consult with tribe on placement:* Any person involved in the placement of an Indian child must consult with the child's tribe to secure a placement that complies with the ICWA placement preferences. (Cal. Rules of Court, rule 5.482(g).)
- E. *Good cause to deviate:* may include the following considerations – the requests of the parent or Indian custodian, the request of the Indian child when of sufficient age, the extraordinary physical or emotional needs of the Indian child as established by a QEW or, the unavailability of suitable families based on a documented diligent effort. The burden of establishing good cause to deviate is on the party requesting the deviation. (Fam. Code § 177(a); Welf. & Inst. Code § 361.31, Cal. Rules of Court, rule 5.484 (b))

**XI. Notice to Secretary of Interior/Child's Right to Know (25 U.S.C. §§ 1917, 1951; Fam. Code, §§ 9208, 9209)**

- A. On the adoption of an Indian child, the clerk of the court must send notice to the Secretary of the Interior.
- B. On turning 18, an adopted Indian child has the right to learn all information necessary to protect any rights flowing from the individual's tribal relationship.